Nos. 76-101 and 76-205

In the Supreme Court of the United States

OCTOBER TERM, 1976

DEMOCRATIC NATIONAL COMMITTEE, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION,
UNITED STATES OF AMERICA, ET AL.

THE HONORABLE SHIRLEY CHISHOLM, ET AL.,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION,
UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 23a-126a)[1] is not yet reported. The opinion of the Federal

[1] "Pet. App." refers to the appendices in No. 76-101.

Communications Commission (Pet. App. 1a-22a) is reported at 55 F.C.C. 2d 697.

JURISDICTION

The judgment of the court of appeals was entered on April 12, 1976. A timely petition for rehearing by the petitioners in No. 76-205 was denied on May 13, 1976 (Pet. App. 127a-128a). The petition for a writ of certiorari in No. 76-101 was filed on July 23, 1976, and the petition in No. 76-205 was filed on August 11, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Section 315(a)(4) of the Communications Act of 1934 exempts "on the spot coverage of bona fide news events" from the requirement of Section 315(a) that a broadcaster affording air time to a political candidate must make equal time available to all competing candidates. The Federal Communications Commission has held that press conferences of political candidates and debates between political candidates (not arranged by the broadcaster) may be "bona fide news events," and that live and complete coverage of them may be exempt from the equal time requirement. The questions presented are:

1. Whether the Commission properly interpreted the statute (both petitions).

2. Whether the Commission should have used a formal rulemaking proceeding rather than an adjudicatory proceeding as the forum in which to interpret the statute (No. 76-205 only).

STATUTORY PROVISIONS INVOLVED

Relevant portions of Section 315(a) of the Communications Act of 1934, 48 Stat. 1088, as amended, 47 U.S.C. (and Supp. V) 315(a), are set forth at Pet. App. 129a.

Section 315(d) of the Communications Act of 1934, as added, 66 Stat. 717, and redesignated, 47 U.S.C. (Supp. V) 315(d), provides:

> The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section.

STATEMENT

1. As originally enacted, Section 315 of the Communications Act of 1934, 48 Stat. 1088, provided that:

> If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station * * *.

For 25 years the Federal Communications Commission did not apply this "equal time" provision to the appearance of a candidate on a newscast.[2] In 1959, however, the Commission reversed its prior interpretation and held that licensees must afford equal exposure to all qualified candidates whenever any candidate appears on a regularly scheduled newscast. *Columbia Broadcasting System, Inc.* (*Lar Daly*), 18 P & F Radio Reg. 238, reconsideration denied, 26 F.C.C. 715.

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[2] See, *e.g.*, *Allen H. Blondy*, 40 F.C.C. 284.

Many people feared that the *Lar Daly* rule "would tend to dry up meaningful radio and television coverage of political campaigns." S. Rep. No. 562, 86th Cong., 1st Sess. 10 (1959). Congress promptly overruled the Commission's decision by amending Section 315 to exclude four categories of news programs from the equal time rule. These categories are (Section 315(a)):

> (1) bona fide newscast,
>
> (2) bona fide news interview,
>
> (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
>
> (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto).

In *The Goodwill Station, Inc.*, 40 F.C.C. 362, and *National Broadcasting Co.*, 40 F.C.C. 370, the Commission held that coverage of debates between political candidates was not "on-the-spot coverage of bona fide news events" within the meaning of the exemption. In reaching this conclusion the Commission relied in large part upon portions of the legislative history of the amendment (see, *e.g.*, H.R. Rep. No. 802, 86th Cong., 1st Sess. (1959)) which tended to indicate that the exemption was limited to situations where the appearance of a candidate was "incidental to" some independent news event, and was not available where the appearance of the candidate constituted the only newsworthy element of the event.

Two years later the Commission relied upon these decisions to hold that a press conference of the President or a presidential candidate was not a "bona fide news event," and that a station broadcasting such a news conference therefore would be required to make equal time available to other candidates. *Columbia Broadcasting System, Inc.*, 40 F.C.C. 395.[3]

2. On April 22, 1975, the Aspen Institute Program on Communications and Society ("Aspen") petitioned the Commission to overrule *The Goodwill Station* and *National Broadcasting Co.* Aspen argued that those decisions were founded upon a misreading of the legislative history of the 1959 amendment to Section 315. On July 16, 1975, CBS, Inc., petitioned the Commission to overrule *Columbus Broadcasting System.*[4] Petitioners in this Court filed written comments with the Commission opposing the Aspen and CBS petitions.

3. The Commission overruled *Goodwill Station, National Broadcasting Co.* and portions of *Columbia*

[3] The Commission also held that a press conference would not be exempt as a "bona fide news interview" within the meaning of Section 315(a)(2).

[4] By news release of April 28, 1975, the Commission officially announced the filing of Aspen's petition. Chairman Wiley's prepared statement on the same day before the Senate Communications Subcommittee (Hearings on S. 2, S. 608 and S. 1178 (Fairness Doctrine) before the Subcommittee on Communications of the Senate Committee on Commerce, 94th Cong., 1st Sess. 54 (1975)) referred to the filing in connection with several bills dealing with political broadcasting and the fairness doctrine. In addition, the May 5, 1975, issue of *Broadcasting* magazine carried a story about Aspen's efforts to have the Commission alter its interpretation of the Section 315(a)(4) exemption. The *Washington Post* (July 18, 1975, p. A17) reported the filing of the CBS petition.

Broadcasting System.[5] It concluded that they were based upon an incorrect reading of the legislative history of the 1959 amendment, observing (Pet. App. 8a, footnote omitted) that its earlier decisions had relied upon—

> a report of a bill which was not enacted into law. The bill discussed in the August 6 House Report did indeed require that appearances by candidates must be "incidental to" another event—and this requirement was explicitly set forth in the bill. The bill as enacted, however, did not limit the exemption to appearances of candidates which were "incidental to" other news. During the floor debate in the House, Rep. Bennett of Michigan warned the House that the "incidental to" language must be deleted or the bill would not work, citing the text of the bill and the language of the House Committee report, 105 Cong. Rec. 16241. That language was stricken in conference, and in floor discussion of the conference report Bennett again took the floor to comment on the deletion of the provision: "I am glad to see that the conference substitute omits this language because the majority of conferees felt as I do, that this requirement would lead to even greater confusion than we have at present." 105 Cong. Rec. 17778. The conference bill was then adopted.

[5] The Commission did not grant all of the requested relief. Aspen had requested clarification of the Section 315(a)(2) exemption for a bona fide news interview; CBS had sought a ruling that the Section 315(a)(2) exemption encompasses presidential news conferences. The Commission deferred action on Aspen's Section 315(a)(2) request pending "a more expansive proceeding" (Pet. App. 2a) and denied CBS's request (Pet. App. 12a–16a).

Because the "incidental to" language upon which it had relied was deleted, the Commission concluded, the amendments should be interpreted so that a newsworthy program "does not lose its exempt status because the appearance of a candidate is a central aspect of the presentation, and not incidental to another news event" (Pet. App. 9a). The Commission held that Congress intended to rely upon each broadcaster's reasonable judgment that an event is newsworthy (*ibid.*), and it held that the Section 315(a)(4) exemption encompasses (1) debates between political candidates sponsored by an organization other than the broadcaster, and (2) press conferences covered live and in their entirety (*id.* at 7a, 16a). The Commission wrote that its decision would carry out the intent of the 1959 amendment and serve "the public interest by allowing broadcasters to make a fuller and more effective contribution to an informed electorate" (Pet. App. 10a).

4. The court of appeals (with one judge dissenting) upheld the Commission's decision. It found that Congress expressly delegated to the Commission the task of interpreting and administering the statute, and that the legislative history "provides substantial support" for the Commission's interpretation (Pet. App. 37a–40a). The court rejected, as "unsupported by the legislative history" (*id.* at 40a), the contention that the exemptions should be narrowly construed. The purpose of the 1959 amendments, the court found, was "broadly remedial, and evidenced a willingness by Congress to take some risks" (*id.* at 40a–41a) by experimenting with exceptions to the equal time philos-

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ophy, in order better to inform the voting public by allowing broadcasters more fully to cover political news. The court noted that (*id.* at 45a)—

> the thrust of the 1959 amendment was toward increasing broadcaster discretion to cover political news. We find the Commission's *Opinion* entirely consistent with this theme.

The court rejected the argument that congressional inaction following *Goodwill Station* and *National Broadcasting Co.* amounted to legislative approval of those interpretations of the statute. It carefully examined Congress' consideration of Section 315 after the Commission's rulings and concluded that the failure of Congress to act was entirely consistent with a legislative intent to leave the task of interpreting (and reinterpreting) the exemptions to the agency (Pet. App. 49a–50a).

Finally, the court concluded that the Commission properly announced its new view of the statute in adjudicative proceedings, relying upon cases of this Court that hold that the choice to proceed by rulemaking or by adjudication is within the discretion of the agency (Pet. App. 54a–55a). It stated that an adjudicatory reconsideration of an interpretation created through adjudication is "particularly appropriate" (*id.* at 56a) and observed that the "issues were fully aired before the Commission" (*ibid.*) in comments filed in substantially the manner that they would have been filed in a rulemaking proceeding.

ARGUMENT

We rely upon the opinions of the Commission and the court of appeals, which demonstrate that the Commission did not overstep its authority in interpreting Section 315(a)(4). There is no reason for further review.

1. Petitioners' arguments seem to start from the assumption that Section 315 is designed to provide all candidates with equal amounts of broadcast exposure. It is not. The 1959 amendment was designed to relax that rigid rule, and to provide the Commission with discretion to define the extent of that relaxation. See Section 315(d). Section 315(a) authorized the Commission to strike a delicate balance between equal exposure for all candidates and sufficient coverage of political events. See S. Rep. No. 562, 86th Cong., 1st Sess. 10, 13 (1959). A broadcaster cannot promote a particular candidate by affording him attention unrelated to the newsworthiness of his activities; that rule has been unchanged since 1934 and is unaffected by the Commission's decision here. But the 1959 amendment, and the Commission's decision here, recognize that an unqualified rule of equal exposure might inhibit broadcasters from giving exposure to any candidate or significantly reduce campaign coverage, thereby denying valuable information to the public at the same time as it crimped the discretion of a broadcaster to be selective with respect to its political coverage. See the remarks of Rep. Celler, 105 Cong. Rec. 16227 (1959).[6]

[6] See also Hearings on H.R. 7985 (Radio Broadcasting: Political Broadcast-Equal Time) before the Subcommittee on Communications and Power of the House Committee on Interstate and Foreign Commerce, 86th Cong., 1st Sess. 2 (1959) (comment of Chairman Harris).

Faced with a choice between severely limited news coverage of any candidate or greater broadcast coverage of major candidates with the attendant possibility that all candidates would not receive equal air time, Congress and the Commission have selected the latter. The Commission's belated recognition that debates and press conferences (of the sort often reprinted *verbatim* in the *New York Times*) may be news events in their own right, and not publicity devoid of news value, is unquestionably correct.

Petitioners argue (Pet. No. 76–101 at 15; Pet. No. 76–205 at 7) that the Commission has misconstrued the legislative history of Section 315(a)(4). Both the Commission and the court of appeals acknowledge that portions of the legislative history look both ways. The court of appeals, after examining the legislative history, concluded (Pet. App. 59a):

> It is the job of the Commission in the exercising of its delegated authority, and ultimately of Congress, to make these kinds of front-line determinations. We find no basis for disturbing the Commission's action here, grounded as it is on the Commission's interpretation of Congressional intent, an interpretation which we find reasonable.

We do not doubt that there is some ambiguity. But the legislative history provides "much support" for the Commission's interpretation (Pet. App. 59a). Ambiguity of this sort is properly resolved by the agency charged with interpretation and resolution of the statute.[7] *Trafficante* v. *Metropolitan Life Insurance Co.*,

[7] See also S. Rep. No. 562, 86th Cong., 1st Sess. 12 (1959); 105 Cong. Rec. 16227 (1959) (remarks of Rep. Celler); 105 Cong. Rec. 14455 (1959) (remarks of Sen. Pastore), which indicate that Congress intended the Commission to have discretion to resolve matters of this sort.

409 U.S. 205, 210; *Udall* v. *Tallman*, 380 U.S. 1, 16; *Unemployment Commission* v. *Aragon*, 329 U.S. 143, 153.

Petitioner in No. 76–101 relies (Pet. 15) upon events in Congress after the 1959 amendment and the Commission's first interpretative decisions. Attributing significance to congressional failure to repudiate particular decisions is a hazardous venture, however (*Zuber* v. *Allen*, 396 U.S. 168, 185–186 n. 21; *United States* v. *Price*, 361 U.S. 304, 310–311), and there is no reason to indulge in it here. Congress' inaction must be viewed in light of its decision to delegate to the Commission discretion to decide which particular events qualify for the broadly defined news coverage exemptions. See Section 315(d). That Congress did not correct the Commission's decisions reflects the broad scope of the Commission's discretion, not Congress' view on the merits.

Petitioners raise the spectre that the Commission's decision in this case will cause the demise of the equal time rule (Pet. No. 76–101 at 13–14; Pet. No. 76–205 at 7, 16 n. 19). These concerns are not justified. The Commission's holding concerns only debates and press conferences of political candidates not created by the stations themselves. This holds to a minimum the risk that stations will manufacture publicity for favored candidates, and broadcasters' determinations that an event is newsworthy will of course be subject to Commission review under standards of good faith and rea-

sonableness. Moreover, Section 312(a)(7) of the Act, as added, 86 Stat. 4, 47 U.S.C. (Supp. V) 312(a)(7), guarantees any candidate for federal office reasonable access to broadcast facilities; and the Commission's fairness doctrine affords further protection against broadcaster attempts to promote one candidate over others.

2. The Commission did not abuse its discretion by reaching its decision in adjudicatory rather than rulemaking proceedings. As this Court explained in *National Labor Relations Board* v. *Bell Aerospace Co.*, 416 U.S. 267, 293, quoting from *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 203, "the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency." The Commission's choice to proceed by adjudication did not prejudice any party to the case. The petitioners in this Court (Pet. App. 56a–57a)—

> submitted lengthy comments to the Commission in opposition to the Aspen and CBS petitions. As in *Bell Aerospace, supra,* we believe the issues were fully aired before the Commission, which had the benefit of all arguments raised before this court. It is therefore difficult to see how requiring the Commission to go through the motions of notice and comment rulemaking at this point would in any way improve the quality of the information available to the Commission or change its decision. The only result would be delay while the Commission accomplished the same objective under a different label.

Requiring the Commission to proceed by rulemaking rather than adjudication would "exalt form over necessity." *Securities and Exchange Commission* v. *Chenery Corp., supra,* 332 U.S. at 202.

The facts of this case make adjudicatory disposition particularly appropriate. The Commission's prior interpretations of Section 315 were issued as adjudicatory decisions, and the questions are entirely legal. The decision interprets the statutory language and legislative history, and does not involve the kind of inquiry into facts or industry experience that may more appropriately be assessed in rulemaking proceedings.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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